No. 42231-0-II
(consolidated with No. 41811-8-II)

COURT OF APPEALS
OF THE STATE OF WASHINGTON,
DIVISION II

GARY SMITH

Appellant/Respondent,

v.

CLARK PUBLIC UTILITIES,
a municipal corporation of the State of Washington;

Appellant, and

CLARK COUNTY, by and through the DEPARTMENT OF CLARK COUNTY PUBLIC WORKS, a political subdivision of the State of Washington,

Respondent.

ON APPEAL FROM ~~KING~~ CLARK COUNTY SUPERIOR COURT
(The Honorable Richard Melnick)

APPELLANT CLARK PUBLIC UTILITIES' REPLY BRIEF

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I. INTRODUCTION

The trial court should have granted summary judgment to Clark Public Utilities (CPU) for three separate and independent reasons, all of which Smith fails to rebut.

First, CPU owed no duty pertinent to the circumstances of this case. Because CPU lacked authority to approve or disapprove a structure move, it had no obligation or authority to review, evaluate, supervise, or otherwise regulate NSM's activities. Specific to Smith's claims, CPU had no duty to ensure that NSM's workers stayed a safe distance from energized lines. That duty was solely NSM's.

Second, even assuming CPU owed a duty of care, the duty was not actionable by Smith because he alleges negligent performance of a governmental rather than a proprietary function, such that the public duty doctrine applies. As a matter of law, the special relationship exception to the public duty doctrine does not apply because there is no evidence that Smith or NSM made a direct inquiry to CPU or that CPU responded with any express assurance, much less a *material* assurance such as that CPU would de-energize the lines or that there was sufficient clearance to permit the prudent and lawful use of a top rider. Nor could reliance upon such an assurance have been justifiable where NSM knew of the hazard, provided inaccurate and incomplete information to CPU, had the duty to arrange and pay for disconnection of utilities if necessary, had the duty to ensure compliance with worker safety regulations, and could not rely upon any

statement by CPU as an assurance that its employees would not suffer injury while riding on top of a moving structure close to energized lines.

Third, even assuming CPU owed a duty to Smith individually, there was no evidence to support a finding of breach because CPU made no material representation or assurance to Smith or NSM and, in any event, was entitled to rely on NSM's representations that it "measured the entire route," its load was "below any utility wire heights," and there were "no conflicts with any [of] CPU's facilities" other than three guy poles. CP 823, 825, 830.

Smith mischaracterizes CPU's arguments in calling them an "exercise in contradiction."[1] CPU does not concede it owed any duty pertinent to Smith's claim. Assuming CPU owed a duty of care with respect to NSM's permit application to Clark County, that duty extended to the public in general and not to Smith individually. CPU's no-breach argument assumes the existence of a duty to Smith individually only for the sake of argument. Because CPU owed no actionable duty to Smith, and because as a matter of law there was no breach even if a duty existed, it was error to deny summary judgment to CPU. This Court should reverse the denial of summary judgment and direct entry of a summary judgment dismissing Smith's claims against CPU with prejudice.

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[1] *Cross-Response/Reply Brief of Appellant Smith* at 22.

II. AUTHORITY AND ARGUMENT

A. CPU's Duty, If Any, Was to the Public In General and Thus Non-Actionable under the Public Duty Doctrine Actionable.

1. Smith Alleges Breach of a Public Duty.

The Clark County Code places the burden on the applicant for a structure-moving permit to arrange and pay for disconnection of utilities where necessary. CCC § 10.06A.070(c)(11) (CP 811-12). NSM never requested disconnection of utilities. CPU lacked authority to approve or disapprove a structure move and thus had no obligation or authority to review, evaluate, supervise, or otherwise regulate NSM's activities. As a result, CPU owed no duty of care with respect to NSM's permit application to Clark County.

But assuming the Clark County Code could be read to impose obligations upon CPU with respect to proposed structure moves, the public duty doctrine would apply here because Smith alleges breach of a public duty. A public duty, which is not actionable, is one owed to the public at large, rather than any particular individual. *Osborn v. Mason County*, 157 Wn.2d 18, 28, 134 P.3d 197 (2006). A municipality owes a public duty where the activity the plaintiff alleges was negligently performed was governmental or quasi-governmental, rather than proprietary. *Stiefel v. City of Kent*, 132 Wn. App. 523, 529-30, 132 P.3d 111 (2006). Smith confuses these principles by analyzing a nonexistent "proprietary function exception" to the public duty doctrine.[2] Analysis of

[2] *Cross-Response/Reply Brief of Appellant Smith* at 23 (internal quotation marks omitted).

proprietary versus governmental functions does not pertain to any exception, but determines whether the municipality owed a public duty, such that the public duty doctrine applies. *See id.*

In making the blanket assertion that an "electric utility is a proprietary function of government,"[3] Smith fails to acknowledge that municipal corporations may engage in multiple activities with different and sometimes overlapping purposes, some governmental, some proprietary. *Stiefel*, 132 Wn. App. at 529-30; *see also Okeson v. City of Seattle ("Okeson I")*, 150 Wn.2d 540, 550, 78 P.3d 1279 (2003), and other cases cited in *CPU's Opening Brief* at 13-14.[4] Smith concedes one purpose of review of a proposed structure move is to ensure the absence of conflicts that could jeopardize public safety.[5] He does not dispute that his allegations are directed at that function. Nor does he dispute that review for public safety purposes is a governmental function.[6] Under *Stiefel*, the public duty doctrine therefore applies.

This Court should reject Smith's creative attempt to recast CPU's argument as focusing on the nature of the injury suffered, rather than the municipality's activity. This is a strawman; CPU focuses on the nature of the activity. The problem is Smith ignores that when an activity has

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[3] *Cross-Response/Reply Brief of Appellant Smith* at 23.

[4] Smith likewise ignores that activity by an electric utility is *presumed governmental* unless "(a) it is part of the production and sale of electricity and (b) it is for the 'comfort and use' of individual customers paying only for their own usage, not for general public use." *Okeson v. City of Seattle ("Okeson II")*, 159 Wn.2d 436, 449, 150 P.3d 556 (2006), quoting *Okeson I*, 150 Wn.2d at 550.

[5] *Cross-Response/Reply Brief of Appellant Smith* at 26.

[6] *See CPU's Opening Brief* at 14-15.

multiple purposes, the analysis focuses on the aspect the plaintiff alleges was negligently performed. *Stiefel*, 132 Wn. App. at 530. Smith makes no attempt to distinguish *Stiefel*, which is analogous in that it involved dual, overlapping functions with different purposes and the public duty doctrine applied because the plaintiffs' allegations focused on a governmental function.

In *Stiefel*, the plaintiffs alleged that the city of Kent's water supply was inadequate for fire protection purposes. 132 Wn. App. at 526-27. Affirming a summary judgment of dismissal based on the public duty doctrine, the court of appeals reasoned:

> As the Stiefels correctly note, the general operation of a municipal water system is a proprietary function. ... But...the Stiefels are not alleging any deficiency in the delivery of the domestic water supply, but rather the negligent operation and maintenance of City and County fire protection services. ...
>
> The fact that the same water supply line serves both fire hydrants and the domestic water system does not convert a fundamentally governmental function into a proprietary one. ...
>
> ... Because their claims are directed solely to the governmental function of fire protection services, including the incidental delivery of water through fire hydrants, the claims are barred by the public duty doctrine.

Id. at 530.

The rationale of *Stiefel* applies here. Smith does not allege CPU was negligent in carrying out any proprietary function such as protecting its equipment or preventing disruption of service, but rather in assuring public safety in the context of reviewing an activity proposed in a permit

application—a governmental function.[7] Smith misses the point in arguing "there is ample evidence to support a finding that CPU was acting to protect its business equipment and avoid disruption of electrical service to its customers."[8] That CPU's review of the proposed structure move had dual functions does not give rise to an issue of material fact regarding the nature of the activity because Smith's claims "are directed solely to the governmental function of [assuring public safety]." *Stiefel*, 132 Wn. App. at 530.

This Court did not hold otherwise in *Borden v. City of Olympia*, 113 Wn. App. 359, 53 P.3d 1020 (2002). There, the city of Olympia assisted private developers in designing, engineering, and paying for a storm water drainage system. The plaintiffs alleged that the system caused flooding on their property. Reversing a summary judgment in favor of Olympia, this Court ruled that Olympia engaged in a proprietary function because "[i]t essentially was aiding and cooperating with private developers" in a business-like venture. *Id.* at 371.

Here, unlike the situation in *Borden*, CPU did not engage in a business-like venture with NSM. CPU did not assist NSM with planning or carrying out the structure move, but merely reviewed the information provided by NSM and relocated guy poles as specifically requested and paid for by NSM pursuant to CCC § 10.06A.070(c)(11) (CP 811-12). Smith asserts that, under CPU's analysis, "if the victims in *Borden* had

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[7] *See Cross-Response/Reply Brief of Appellant Smith* at 26.

[8] *Cross-Response/Reply Brief of Appellant Smith* at 26.

drowned, rather than suffered property damage, then the public duty doctrine would apply" because failure to prevent drowning would be a public safety issue, and thus a governmental function.[9] This is not so. *Borden* is consistent with *Stiefel* in that both courts focused on the target of the plaintiff's allegations in determining whether the function was proprietary or governmental. The results would have been the same regardless of the nature of the injury suffered.

In sum, there is no genuine issue of material fact regarding application of the public duty doctrine because Smith alleges CPU was negligent in carrying out a governmental rather than a proprietary function.

2. Smith Failed to Present Evidence to Satisfy Any of the Elements of the Special Relationship Exception to the Public Duty Doctrine.

a. Smith Had No Direct Contact with CPU and Cites No Authority to Find Privity Absent Such Contact.

"Privity" in the context of the special relationship exception refers to direct contact between the public official and an injured plaintiff that sets the injured plaintiff apart from the general public. *Babcock v. Mason County Fire Dist. No. 6*, 144 Wn.2d 774, 787, 30 P.3d 1261 (2001); *see also Smith v. State*, 59 Wn. App. 808, 813, 802 P.2d 133 (1990) (holding that the special relationship exception was inapplicable absent evidence of direct contact with the plaintiff).

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[9] *Cross-Response/Reply Brief of Appellant Smith* at 24-25.

There is no evidence Smith knew of NSM's interactions with CPU, much less that he himself had any contact with CPU, direct or indirect. Smith concedes no authority exists for the proposition that contact between a public official and the plaintiff's employer is sufficient to establish privity for purposes of the special relationship exception.[10] Smith cites no case where privity was established absent any contact between the injured person and the municipality. This is not surprising because the privity element should identify persons who could conceivably meet the other elements of the special relationship exception in that they may have received and justifiably relied upon an express assurance by a public official.

There is no evidence in the record to support privity between Smith and CPU, and because the other two elements of the special relationship exception are clearly not met, this is not an appropriate case to consider easing the privity requirement and thus expanding the exception.

b. Even Assuming Direct Contact by NSM Rather than Smith Were Sufficient, the Record Does Not Support Smith's Assertion that NSM Made a Direct Inquiry to CPU and that CPU Responded with an Express Assurance.

The requirement of an express assurance is critical because "[t]he burden of compliance with codes, regulations and ordinances remains the responsibility of the applicant." *Meaney*, 111 Wn.2d at 179. "It is only where a direct inquiry is made by an individual and incorrect information is clearly set forth by the government, the government intends that it be

[10] *Cross-Response/Reply Brief of Appellant Smith*, at 28.

relied upon and it is relied upon by the individual to his detriment, that the government may be bound." *Id.* at 180.

Smith concedes he made no inquiry and CPU made no express assurance to him personally. Accordingly, the special relationship exception cannot apply. *Smith*, 59 Wn. App. at 813.

Even assuming a direct inquiry by Smith's employer, NSM, and express assurance by CPU to NSM could satisfy the requirement, there is no evidence that any such inquiry or assurance was made. To support his assertion that NSM "sought assurances from CPU regarding any potential hazards," Smith cites "CP 156," a page from NSM's response to an investigation by the Department of Labor and Industries. Although Smith does not refer to any specific text on CP 156, presumably he relies on this and other similar statements by NSM: "As part of the application process, it is Clark County's responsibility in conjunction with the utility companies to determine whether the power utility line crews should be present during the move."

Nothing in this statement or anywhere else in the record indicates that NSM made any direct inquiry to CPU. Instead, the evidence is that NSM affirmatively represented to CPU that there was no cause for concern. *See, e.g.,* CP 823, 825, 830. Moreover, because Smith was injured only because he was on the roof in proximity to the energized lines, only an inquiry regarding disconnection of the lines or use of a top rider would be material to Smith's claim. There is no evidence that NSM ever discussed either of those topics with CPU.

Even assuming NSM had made a direct inquiry, there was no corresponding express assurance. To support his assertion that CPU made an express assurance to NSM, Smith states: "CPU's employee, Hinkel, assured NSM that 'everything was within the distance [from CPU's facilities] that was necessary[.]'"[11] Smith omits the context leading up to this quotation from Bob Hinkel's deposition, which shows that Mr. Hinkel did not testify that NSM made any inquiry or that he made any assurance to NSM, express or otherwise. Mr. Hinkel testified that he measured the proposed route based on the limited (and, ultimately, incorrect) information NSM had provided, not that he had any communications with NSM regarding his findings:

> Q. ... On March 9, 2005, it says that you looked for any obvious clearance issues. Are you talking about the width of the house?
>
> A. No, that was overhead.
>
> Q. Okay. And what did you have to determine any obvious clearance issues on March 9, 2005 if you just had the one map that was attached to the fax?
>
> A. Well, I went off that one map, and then their loaded height from [the] fax.
>
> Q. And did you take any notes down as to what you saw out there on that day in relation to the map that was provided and the state heights?
>
> A. No, because there were no conflicts. If there would have been conflicts, I would have made notes.
>
> Q. Okay. And why do you say there were no conflicts?

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[11] *Cross-Response/Reply Brief of Appellant Smith* at 29, quoting Deposition of Robert Hinkel, CP 832.

A. Because I measured it out and looked for them. If there would have been conflicts, I would have included that in the job for the pole relocations.

Q. How did you look for conflicts on March 9, 2005?

A. Drove out to the area that I had, and you just visually—you know, you're looking, and like I say, you get attuned to, when you do—in the industry you're used to the heights, I mean you can look at something and tell if it's high or low or intermediate. And then you stop and measure anything that looks like it might be questionable. That, you know, it's obvious if something's 30 foot in the air you're clean, but if something looks like it's at 18 foot or less you stop, or even 20 foot or less you'll stop and measure it. So I drove through it and I measured several little spots along the way, and everything was within the distance that was necessary *for the heights they gave us.*

CP 832 (emphasis added). There is no evidence of an express assurance here.

Even assuming there were evidence that CPU had expressly assured NSM that the clearances were "within the distance that was necessary" for the structure move, such an assurance would not be material to Smith's claim.[12] Instead, Smith must point to evidence that CPU expressly assured NSM that it would de-energize the lines or that the clearance from the energized primary lines[13] was sufficient to permit the prudent and lawful use of a top rider. That NSM would use a top rider was not a given, as top riders are not necessary in a structure move. NSM

[12] Such an assurance would also have been *true*. NSM's measurements put the maximum loaded height of the house at 6 ½ feet below the energized primary line. CP 847.

[13] Only the primary hot wire—located in the highest position—is a matter of concern. Contact with a neutral power line, mounted lower, does not cause an electric shock. CP 911.

did not routinely use top riders before Smith's injury, and it banned the practice after Smith's injury. CP 743. CPU design engineer Bob Hinkel testified, "Almost every house move you see they take a piece of PVC pipe and they bow it over the top of the house, so when they pull up and hit a telephone wire, it just slides over the top of that PVC." CP 833. Smith does not contend, much less point to evidence, of any express assurance by CPU that the lines would be de-energized or that there was sufficient clearance from the energized lines to permit use of a top rider.

This situation is nothing like that in *Rogers v. Toppenish*, 23 Wn. App. 554, 596 P.2d 1096 (1979), cited by Smith. There, in response to a specific inquiry, a city building inspector stated that the property the plaintiff intended to purchase was zoned for an apartment house when, in fact, only single-family residences or duplexes were allowed. *Id.* at 555-57. Affirming a judgment for the plaintiff, this Court held that the inspector's statement qualified as an express assurance for purposes of the special relationship exception. *Id.* at 561. Here, in contrast, there is no evidence that NSM made any inquiry to CPU or that CPU made any representation or assurance, much less one material to Smith's claim.

c. Even Assuming CPU Had Made an Express Assurance, the Record Does Not Support Justifiable Reliance by Smith or NSM.

There is no evidence that Smith knew of, much less relied on, NSM's interactions with CPU. Claiming that reliance by NSM should suffice, Smith asserts that NSM justifiably relied on CPU's supposed express assurances, again citing NSM's response to the Department of

Labor and Industries investigation at CP 156.[14] Nothing in that document or anywhere else in the record indicates that NSM relied on any assurance by CPU, assuming one had been made, regarding clearances from energized lines. Nor would reliance on such an assurance have been justifiable, for at least five reasons.

First, reliance is not justified where the actor was aware of the potential harm. *Weaver v. Spokane County*, __ Wn. App. __, 275 P.3d 1184, 1191 (2012). NSM knew that CPU's lines were energized and knew or should have known of the hazards associated with placing its workers in proximity to energized lines. *See* WAC 295-155-428(1)(a).

Second, the Clark County ordinance at issue did not impose any affirmative obligation on CPU with respect to a structure move, but required NSM as the applicant to make arrangements for the disconnection and connection of utilities, if necessary. CCC § 10.06A.070(c)(11) (CP 811-12). Clark County, not CPU, had the obligation to enforce this requirement.

Third, reliance is not justified where the permit applicant provided inaccurate or incomplete information to the government. *Meaney v. Dodd*, 111 Wn.2d 174, 180, 759 P.2d 455 (1988) (holding that, where a permit applicant provided inaccurate and incomplete information regarding anticipated noise, he could not rely on the permit as an assurance of compliance with noise regulations). NSM knew that CPU possessed only the limited information it had provided regarding the structure dimensions

[14] *Cross-Response/Reply Brief of Appellant Smith* at 30.

and proposed route. CP 830-31. Furthermore, the information NSM provided was not only incomplete but inaccurate, as the loaded height of the structure was almost two feet taller than NSM represented. CP 823, 847.

Fourth, as discussed in CPU's Opening Brief at 19-23 and in the next section of this Reply Brief, it was NSM's, not CPU's, responsibility to ensure that its workers maintained a safe distance from energized lines. *See Briggs v. PacifiCorp*, 120 Wn. App. 319, 326, 85 P.3d 369 (2004).

Finally, reliance is not justified where it would be unreasonable. *Babcock*, 144 Wn.2d at 793 (holding it was unreasonable to rely upon fire fighter's statement that fire fighters would "take care of his property" as an assurance that his property would be saved from damage). For all of the reasons mentioned above, reliance by NSM upon any statement by CPU as an assurance that its employees would not suffer injury while riding on top of a moving structure in proximity to energized lines would not have been reasonable.

There is no evidence in the record from which a trier of fact could find facts establishing any of the elements of the special relationship exception to the public duty doctrine. As a matter of law, the exception does not apply, and the public duty doctrine bars Smith's claim against CPU. Summary judgment should have been granted.

3. The Public Duty Doctrine Should Not Be Abolished.

Smith is incorrect in asserting that the public duty doctrine "virtually resurrect[s] the abrogated doctrine of sovereign immunity."[15] The court of appeals and supreme court have repeatedly held that the public duty doctrine does not confer immunity but is merely a tool that aids the courts in applying ordinary negligence principles in a context where the duties are typically are owed to the public at large rather than to any particular individual. *See CPU's Opening Brief* at 25-26.

"Traditionally state and municipal laws impose duties owed to the public as a whole and not to particular individuals." *Meaney*, 111 Wn.2d at 178-79. The public duty doctrine and its exceptions "distinguish proper legal duties from mere hortatory 'duties,'" *Osborn*, 157 Wn.2d at 28, and "insure[] that the municipality's tortious conduct will be treated the same as any private citizen[.]" *Meaney*, 111 Wn.2d at 178-79. "Exceptions to the doctrine generally embody traditional negligence principles and may be used as focusing tools to determine whether a duty is owed." *Id.*, quoting *Bishop v. Miche*, 137 Wn.2d 518, 530, 973 P.2d 465 (1999); *see also Chambers-Castanes v. King County*, 100 Wn.2d 275, 287-88, 669 P.2d 451 (1983) (observing that the public duty doctrine does not reinstate sovereign immunity).

Given the supreme court's repeated reaffirmance of the public duty doctrine as not conferring immunity, it would be inappropriate to consider abolishing it on the basis that it does. Regardless, Smith does not dispute

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[15] *Cross-Response/Reply Brief of Appellant Smith* at 4.

that this Court lacks authority to overrule supreme court precedent. *See Johnston v. State*, 164 Wn. App. 740, 265 P.3d 199, 207 (2011).

B. Regardless of the Public Duty Doctrine, CPU Owed No Duty to Smith Because Ensuring Compliance with Jobsite Safety Regulations Requiring Minimum Clearance from Energized Lines Was Strictly NSM's Obligation.

Smith does not dispute that NSM, as his employer, owed him the duty to ensure compliance with WISHA regulations requiring minimum clearance from energized lines. *See Briggs*, 120 Wn. App. at 326. Nevertheless, Smith advances a novel theory that CPU owed him a similar duty because it "retained full control over its facilities, including control over whether it de-energized its own lines or sent along a supervisor to watch over the move."[16]

Retained control is the test for whether a job site owner owes a duty to an employee of an independent contractor under WISHA or common law. *Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 119, 52 P.3d 472 (2002). A general right to inspect or stop the work does not give rise to a duty. *Id.* at 121, 125. Rather, a job site owner that retains control over the manner in which the work is performed, such that the contractor is not free to use its own means and methods, may owe a duty to exercise reasonable care for the safety of the contractor's employees. *Id.*

A contract to perform work is a predicate to the existence of a duty in this context; there can be no liability otherwise. *See Kamla*, 147 Wn.2d at 119. CPU did not hire NSM, and the parties had no contract. Thus, the

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[16] *Cross-Response/Reply Brief of Appellant Smith* at 32.

concept of retained control does not apply and cannot give rise to a duty. *Cf. Tauscher v. Puget Sound Power & Light Co.*, 96 Wn.2d 275, 635 P.2d 426 (1981) (holding that a utility owed a nondelegable duty to employees of a contractor that it hired to perform line work).

Even assuming CPU and NSM had the requisite relationship, CPU still owed Smith no duty because it lacked any right to control the manner in which NSM performed its work. That CPU could elect to de-energize its lines or monitor the structure move did not amount to a right to control the manner in which NSM performed its work. Indeed, CPU lacked authority to approve or disapprove a structure move—that was Clark County's role—and thus had no obligation or authority to review, evaluate, supervise, or otherwise regulate NSM's activities.

Even assuming CPU had a right of control and could or should have foreseen the use of a top rider, foreseeability alone does not give rise to a duty, but rather limits the scope of a duty. *Simonetta v. Viad Corp.*, 165 Wn.2d 341, 349 n.4, 197 P.3d 127 (2008). CPU's duty was to place its lines where workers and members of the public are not likely to come into contact with them. *Briggs*, 120 Wn. App. at 325. Smith does not allege negligence in this regard, but alleges failure to ensure minimum clearance for workers from energized lines. The decision to use a top rider, placing Smith in proximity to energized lines, was within NSM's sole control, and the duty to ensure that Smith maintained safe clearance from energized lines was therefore solely NSM's. *See id.*

This Court should reject Smith's argument that CPU owed him a duty because it "retained full control over its facilities," as this novel theory lacks any support in Washington law. Because CPU owed Smith no duty, its motion for summary judgment should have been granted.

C. Even Assuming CPU Owed a Duty to Smith, as a Matter of Law There Was No Breach.

Assuming CPU owed Smith a duty of care individually, as a matter of law there was no breach, for two reasons.

First, a municipality may rely upon information provided by a permit applicant without any obligation to verify it. *Meaney*, 111 Wn.2d at 180. *Meaney* is factually analogous, and Smith fails to distinguish it. Charles Dodd applied for a permit to operate a sawmill in Skagit County. *Id.* at 175. Not having made any inquiry to the county, Mr. Dodd represented that the mill would result in "some minimum amount of increase [in noise]." *Id.* at 176. The county later shut down the mill for excessive noise. *Id.* Dodd sued alleging the county was negligent in providing information and approving the permit. *Id.* at 177. The supreme court affirmed a summary judgment for the county under the public duty doctrine. *Id.* at 181. The court held that the special relationship exception did not apply because, even assuming Dodd had made a direct inquiry regarding noise regulation, the county was entitled to rely on the information provided by Dodd without any obligation to verify it. *Id.* at 180.

Similar to the permit applicant in *Meaney*, NSM misrepresented the material facts underlying the supposed express assurance upon which Smith bases his claim. *Id.* at 180. Any act or omission by CPU was based on NSM's representations that it had it "measured the entire route," its load was "below any utility wire heights," and there were "no conflicts with any [of] CPU's facilities" other than three guy poles. CP 823, 825, 830. In addition, NSM rejected a safety monitor. CP 831, 833. Based on these representations, which CPU had no obligation to verify, CPU lacked notice of any condition that would require action.

Second, assuming the special relationship exception to the public duty doctrine applied, CPU's duty would have been limited to ensuring that its express assurances to NSM, if any, were correct. *Meaney*, 111 Wn.2d at 179. Smith does not contend CPU made any material representation or assurance, such as that the lines would be de-energized or that the clearance was sufficient to permit use of a top rider. As a result, CPU did not breach any duty, and the trial court thus erred in denying summary judgment to CPU.

D. Appeal against Clark County: In General, CPU Joins in Smith's Reply Arguments.

CPU joins in Smith's arguments in his appeal from the dismissal of Clark County to the extent compatible with CPU's arguments in its appeal from the denial of its motion for summary judgment. The County was obligated to enforce its code, and genuine issues of material fact exist regarding the failure-to-enforce exception to the public duty doctrine. *See*

CPU's Opening Brief at 24-27. As Smith states, "The County was in the best position to regulate and coordinate the safety of the entire move with respect to disconnection of utilities."[17]

III. CONCLUSION

CPU requests that this Court reverse the denial of summary judgment and direct entry of a summary judgment dismissing Smith's claims against CPU with prejudice.

DATED this 3rd day of July, 2012.

CARNEY BADLEY SPELLMAN, P.S.

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[17] *Cross-Response/Reply Brief of Appellant Smith* at 18.

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CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on the date below, I caused copies of *Appellant Clark Public Utilities' Reply Brief, Appellant Clark Public Utilities' Motion to Strike Argument Section 'E' of Brief of Respondent Clark County* and this *Certificate of Service* to be served upon counsel of record as follows:

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DATED this 3rd day of July, 2012.

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